

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

**WAYNE A. BESTER**

**PLAINTIFF**

**v.**

**CAUSE NO. 1:11CV174-LG-RHW**

**MICHAEL J. ASTRUE,  
COMMISSIONER OF SOCIAL SECURITY**

**DEFENDANT**

**ORDER ADOPTING REPORT AND RECOMMENDATION  
AND GRANTING MOTION TO DISMISS**

**BEFORE THE COURT** is the Report and Recommendation [14] entered by United States Magistrate Judge Robert H. Walker on April 4, 2012. Judge Walker determined that this Court does not have jurisdiction to consider this social security appeal, because an administrative hearing was not conducted by the Administrative Law Judge. Plaintiff Wayne A. Bester claims that this Court has jurisdiction over this case, because the Appeals Council erred in failing to consider new and material evidence in violation of 20 C.F.R. § 404.970(b). The Court finds that it does not have jurisdiction to review either the Appeals Council decision or the ALJ's decision under Fifth Circuit precedent. Therefore, Judge Walker's Report and Recommendation is adopted as the opinion of this Court, and the Commissioner's Motion to Dismiss for Lack of Jurisdiction [8] is granted.

**DISCUSSION**

On March 23, 2009, Bester filed an application for social security benefits. He alleged that he had been disabled since January 6, 1999. His application was denied, and the ALJ dismissed Bester's request for a hearing, finding that his application was barred by the doctrine of res judicata given that previous final

decisions had been issued in 2003 and 2008 denying his request for benefits. The Appeals Council denied Bester's request for review of the ALJ's order of dismissal. Bester had provided a report to the Appeals Council that was drafted by one of his physicians one month after the ALJ's 2009 dismissal based on res judicata. The physician opined that Bester was unable to engage in any gainful activity from February 2002 until March 31, 2004. Bester claims that the Appeals Council erred by refusing to consider this report.

Judge Walker found that this Court does not have jurisdiction over Bester's appeal, because 42 U.S.C. § 405(g) limits judicial review to final decisions made by the Commissioner after a hearing. He also explained that federal courts do not have jurisdiction to review the Commissioner's decision that a claim is barred by res judicata. *See Califano v. Sanders*, 430 U.S. 99, 108 (1977). He recommended that this Court should grant the Commissioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

In his Objection to Judge Walker's Report and Recommendation, Bester argues that "the issue is not whether this court has jurisdiction to review the ALJ's decision that Bester's claim is barred by the doctrine of res judicata, but whether this court has jurisdiction to review the Appeals Council's error of law in failing to consider new and material evidence." (Pl.'s Obj. 2, ECF No. 15). This alleged distinction does not affect the Court's jurisdiction. This Court does not have jurisdiction over Bester's appeal, because neither the ALJ's order of dismissal nor the Appeals Council's denial of Bester's request for review constitutes a "final decision . . . made after a hearing." *See* 42 U.S.C. § 405(g); *Brandyburg v. Sullivan*,

959 F.2d 555, 561 (5th Cir. 1992) (denial of review by Appeals Council does not create federal jurisdiction); *Robertson v. Bowen*, 803 F.2d 808, 810 (5th Cir. 1986) (refusals to reopen administrative proceedings and determinations that a claim is barred by res judicata are not reviewable); *Hardin v. Chater*, 95 F.3d 50, \*1 (5th Cir. July 15, 1996) (neither ALJ's order of dismissal on res judicata grounds nor Appeals Council's denial of request for review constituted a final decision pursuant to 42 U.S.C. § 405(g)). Therefore, Judge Walker correctly determined that this Court does not have jurisdiction to consider Bester's appeal.

### CONCLUSION

The Court finds that it does not have jurisdiction over this case. Judge Walker's Report and Recommendation is adopted as the opinion of this Court, and the Commissioner's Motion to Dismiss is granted.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that the Report and Recommendation [14] entered by United States Magistrate Judge Robert H. Walker is **ADOPTED** as the opinion of this Court.

**IT IS, FURTHER, ORDERED AND ADJUDGED** that the Motion to Dismiss for Lack of Jurisdiction [8] filed by the Commissioner of Social Security is **GRANTED**. This lawsuit is hereby **DISMISSED** for lack of subject matter jurisdiction.

**SO ORDERED AND ADJUDGED** this the 7<sup>th</sup> day of June, 2012.

sl/ *Louis Guirola, Jr.*  
LOUIS GUIROLA, JR.  
CHIEF U.S. DISTRICT JUDGE